LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number 413

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WISCONSIN

SYDNEY M. EISENBERG,
1131 West State Street,
Milwaukee 3, Wisconsin,
Attorney for Petitioners.

TABLE OF CONTENTS

	Page
Statement of Facts	2
Jurisdiction to Review	3
Questions Presented	4
Review of State Court Judgment Sought	4
Reasons for Granting the Writ	6
Public Importance	15
Exhibit 1—Copy of Opinion of Wisconsin Supreme Court	19

Table of Cases Cited

Wild vs. People Ex Rel Stephens, 227 Ill. 556, 81 N.W. 707	7
Town of Lake vs. City of Milwaukee, 255 Wis. 419	8
Town of Greenfield vs. City of Milwaukee, 273 Wis. 484	8
Ocean Beach Heights Inc. et al vs. Brown Crummer Investment Co., 302 U.S. 614	14
Sherill vs. O'Brien, 188 N.Y. 185, 81 N.E. 124, 117 Am. St. Rep. 841	17
State ex rel Lamb vs. Cunningham, 83 Wis. 90, 53 N.W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27	17

Table of Statutes Cited

Section 62.07 Wisconsin Statutes	12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray for a Writ of Certiorari to the Supreme Court of the United States to review the Judgment of the Supreme Court of the State of Wis-

consin, entered on March 5, 1957 dismissing the Petitioners' Complaint against the Respondent village to have the Petition for Annexation of certain territories described in Petitioners' Complaint and the Ordinance of Respondent village annexing the said territories declared null and void and that the Petition for Annexation circulated by Petitioners herein to annex a portion of the lands herein to the Village of River Hills deemed to be prior and valid.

STATEMENT OF FACTS

James J. Donohue and Herman P. Freyer (hereinafter referred to as Petitioner) brought an action on May 9, 1955 in the Circuit Court for Milwaukee County, State of Wisconsin, against the respondent village of Fox Point to declare null and void, the proceedings of the Respondent to annex certain lands of the Town of Milwaukee to Respondent village and to have Petitioners proceedings to annex a portion of said lands to the Village of River Hills to be adjudicated as prior and valid. The proceedings for annexation were begun about the same time by Petitioners and the Respondent village with Petitioners posting their notice first.

The property sought to be annexed to the Village of River Hills by Petitioner was a part of the territory sought to be annexed by the Respondent village of Fox Point through the mechanism of what is hereinafter referred to as the Nolte Petition. The Nolte Petition of annexation to the village of Fox Point sought to annex two separate portions of territory consisting of forty-five (45) acres each. Each separate territory had an artificial corridor extension extending approximately one-half mile in length and each of these artificial corridors were one hundred, or less feet in width. The corridors extend to-

ward each other with the Northern forty-five (45) acre corridor extending southward from the major sector. The other forty-five (45) acre corridor extended to the North of the lower forty-five (45) acre sector and such artificial corridor proceeded westward at the tail end so that there was an actual overlap of the two corridors where they met, of only 26.88 feet. The Petitioner Donohue sought to annex the northern sector to the Village of River Hills which lay adjacent to the north of the forty-five (45) acre area. The Petitioner complains that the forty-five (45) acre sector to the south, was not, in fact, an actual part, nor truly connected to the north forty five (45) area since the two, one-half mile artificial corridors only overlapped and the annexation to the Village of Fox Point was brought solely to bring the north forty-five (45) acres, where the electors are opposed to the annexation, into Fox Point against their will.

JURISDICTION TO REVIEW

The date of the Judgment in the Supreme Court of the State of Wisconsin sought to be reviewed was March 5, 1957. The Motion for a rehearing of said Supreme Court Judgment was denied on May 7, 1957, and the Order of the U. S. Supreme Court dated August 5, 1957 extended the time for Petitioners to file their Petitions for a Writ of Certiorari to and including September 2, 1957.

Jurisdiction of this Court is invoked under Section 1254, Title 28, U. S. C. A., Judiciary and Judicial Procedure.

The unofficial report of the Supreme Court of the the Wisconsin Reports in Volume 275, page 182(2) and made a part of this petition as an Exhibit.

QUESTIONS TO BE PRESENTED

1. Whether due process and equal protection of the law has been denied these petitioners in this:

(a) That the lands sought to be annexed by Respondent are not contiguous and lack of contiguity is patent on its appearance.

(b) Whether the removal of Petitioners from one political division to another political division by annexation without the consent of your petitioners and the other inhabitants of the non-contiguous territory is a denial of the equal protection of the law under Article XIV of Amendments, Section I and Article V of the United States Constitution, Amendments.

REVIEW OF STATE COURT JUDGMENT SOUGHT

A review of a Judgment of a State Court is sought and on page 197 of Record, Petitioner, James J. Donohue, demanded that the trial court consider his constitutional rights insofar as the property involved in this lawsuit was under consideration:

> *Witness:* (Donohue) "Your Honor, I'd like to invoke my constitutional rights here. I worked hard for the money with which I bought this property. I was shook down for $250.00 to get into Fox Point."

Counsel for Petitioners raised the question on page 781 of Record as to such constitutional rights as follows:

> *Mr. Eisenberg:* "I agree with the Court 100%. I have never heard of, and I doubt there is any case in comparison, which will ever show that a municipality paid for and encouraged and developed the type of conduct toward one individual with undoubtedly the intent of putting him under their thumb, for whatever reasons are self-evident in that instrument and

in the implications of this case, that you have here. Judge Grubb the other day in Federal Court handed down a decision which I think could very well apply in this case here. You don't gang up on people and deprive them of their constitutional rights such as was done here."

Said question was further raised in oral argument before the trial court and the State Supreme Court by said counsel at which time petitioners' counsel directed the Court's attention to the deprivation of constitutional rights suffered by petitioners because of the alleged illegal annexation which is the subject of this action.

On page 415 of Record, Petitioner James J. Donohue, during the course of the trial testimony, demanded that the trial court consider his constitutional rights regarding the property which was annexed which testimony is as follows:

Witness: (Donohue) "I am going to invoke again my constitutional rights. This man Mr. Cutler handled the annexation. He was paid by the Village of Fox Point."

The Petitioners urged before the Supreme Court of the State of Wisconsin in oral argument and urge here that the Supreme Court of the State of Wisconsin did not apply to the facts of their case the constitutional standard of due process and equal protection of the law.

Your petitioner herein verily believes that the federal question was timely and properly raised so as to give the United States Supreme Court Jurisdiction to issue a Writ of Certiorari. The removal of the petitioning electors from a municipality in which they resided for a number of years, and which municipality had substantial assets and facilities, to another municipality through the

guise of an artificial corridor completely inadequate from a common sense viewpoint, coupled with an annexation proceeding, violated the constitutional guarantees provided for by the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

For the sake of brevity, instead of accompanying this petition with a supporting brief, we are going to present a full argument regarding the questions presented for the consideration of this Honorable Court.

The Areas Sought to be Annexed to Fox Point Under the Nolte Petition Were Not Contiguous.

The property sought to be annexed to the Village of Fox Point consisted of two portions of land alleged by the respondent and found by the Court to be connected by a strip of land, referred to as the corridor, which the Bradley Road intersects at about the middle of the distance between the south and north portions. The total area consists of about 90½ acres. At the point that the corridor extending south from Bradley Road meets the corridor extending north from Bradley Road, the cornering overlaps by only 26.88 feet, not enough to park an average trailer, let alone a residence. (R. 365). The remaining portion of the so-called corridor extending northerly is approximately 100 feet wide. The 26 foot strip or corridor corners the 100 foot strip or corridor at the south boundary line of Bradley Road. The length of the entire corridor from the north boundary of the south tract to the south boundary of the north tract is over one (1) mile.

In *Wild vs. People Ex Rel Stephens*, 227 Ill. 556, 81 NW 707, the Court held that neither two tracts which merely corner each other, nor two tracts with a strip 50 feet wide included merely for the purpose of connecting them constitute contiguous territory. In that particular case the Original Town of Weston marked off a 50 foot strip or corridor along its north boundary and extending west approximately a half mile beyond its west corporate limits joining with a parcel of territory approximately 1000 feet by 550 feet and sought to annex the strip as well as the parcel of territory. The court held that the piece of ground at the west end of the 50 foot strip was not in fact contiguous to the grounds in the village.

Prior to the Fox Point annexation, the City of Glendale had made three annexations from Town of Milwaukee territory involving Bradley Road area west of Port Washington Road. (R. 278) Ordinance No. 88 of the City of Glendale annexed certain territory of the Town of Milwaukee immediately west of the Port Washington Road and south of the Bradley Road. The boundary of the annexation described in said ordinance purports to turn south and then extend in an easterly direction along the south boundary of Bradley Road for a distance of 575.55 feet. (R. 310). The Village of River Hills lies directly north of the annexation mentioned in Ordinance No. 88 and abuts the Glendale territory on the north for a distance of 542.43 feet of the total 575.55 feet of the north Glendale boundary. The south boundary of River Hills for said 542.43 feet is the south line of Bradley Road (R. 614). The balance of the 575.55 feet of the said north purported boundary of Glendale abuts the 100 foot corridor of the Fox Point annexation north of the Bradley Road for a distance of 73.12 feet to the east of said 542.43 foot measurement leaving a corridor 26.88 feet wide which

connects the territory of the Fox Point annexation north of the Bradley Road with the territory in the same annexation south of said Bradley Road. (R. 866). The center of Bradley Road is the north line of the NE¼ of Section 17. Bradley Road is 33 feet wide (R. 844). Annexation description in Glendale Ordinance No. 88 recites that north boundary line of Glendale is on south end boundary of Bradley Road but the point to which it extends is 185.73 feet south of the north line of Section 17 or 152.73 feet south of the south line of Bradley Road (R. 300, 309).

It is respectfully submitted that the Village of Fox Point in the present proposed annexation, due to the faulty annexation of the City of Glendale hereinbefore mentioned, created an overlapping corridor directly south of the Bradley Road 26.88 feet wide and 152.73 feet long for the sole purpose of using same as a subterfuge to connect with the larger tract to the south of the Bradley Road. The tract immediately to the west of said created corridor not annexed by the Village of Fox Point lies south of and abuts the 100 foot corridor for a distance of 73.12 feet.

Counsel for the Village of Fox Point relied on the *Town of Lake vs. City of Milwaukee* case reported in 255 Wis. 419 and the *Town of Greenfield vs. City of Milwaukee* case reported in 273 Wis. 484. Both of those cases involved the area remaining after an annexation was concluded. Appellant does not disagree with the rulings thereon contained. Certainly it is no more than common sense, that after an annexation involving adjacent and contiguous territory has been concluded, odd shapes of land owned by people who do not agree to the annexation may remain. Appellant presumes that the reasoning behind these rulings, to some extent involves the fact that the legislature, in developing a method of proceed-

ing with annexations, attempted to preserve the rights of people owning adjacent territory, who opposed the annexation and did not fall within that classification of people outvoted and yet compelled to concede the annexation.

In our case, a map of the area involved would clearly show a large area of territory more than one-half mile south of the Bradley Road with a thin artificial corridor extending north to the Bradley Road. Respondent claims that a majority of the people in that area desired annexation with the Village of Fox Point. Similarly, a map of the north area involved in this litigation shows a large district over a half mile north of the Bradley Road from which an artificial corridor 100 feet wide extends south. As previously stated, the cornering of the two artificial corridors, if correctly stated by the respondent, would only create a 26.88 foot overlapping. It is conceded that the respondent, Village of Fox Point, did not have a majority of the residents in the north sector desiring annexation with the Village of Fox Point. It is apparently only to control the appellant, that the respondent seeks to include him as the major owner of the realty in the north area within the confines of the annexation which respondent seeks to have the Supreme Court approve. The rights of the appellant have been totally disregarded in the decision of the lower courts. Although the character of the northern district is totally dis-similar from the character of the southern district, respondents claim that the artificial corridor running over 1 mile in length connects the two totally dis-similar districts. The southern district involved in our particular case is practically completely built up with homes and residence. The northern district involved consists of acreage and unimproved land owned primarily by the appellant who

is opposed to the idea of subdividing his land and who is aware of the potential danger involved in this annexation where certain people connected with the Village administration have already openly stated their hostility. It is obvious that appellant's failure to assert his rights would only lead to more litigation, expensive to appellant and innumerable hardships which can presently be predicted with almost absolute certainty. The heavy cost of installing sewer and water and other Village improvements, though undesired by appellant, are only a few of the many problems which an annexation would produce, all directed toward a forced sale of the realty involved in the northern district claimed as part of this annexation.

The Nolte Petition for Annexation Is Totally Defective.

It is respectfully submitted that the description contained in the Nolte petition for annexation to Fox Point is not a complete description. The western boundary of the corridor north of Bradley Road, the same being the easterly limits line of the Village of River Hills, extends to "a point 33 feet south along said limits line from the center of Bradley Road, thence Easterly along the South line of West Bradley Road to a point which is 575.55 feet East."

Francis J. Stein testified (R. 911) that he was a Civil Engineer in the office of the Milwaukee County Planning Department. Plaintiffs' Exhibit 59 was the official record of Milwaukee County and is a map showing widths of roads prepared by Milwaukee County in 1936 and 1940 (R. 913). Plaintiffs' Exhibit 60 is the original official record dated July 14, 1848, showing widths of roads in Township of Milwaukee and this record is a survey of roads in 1848 and is a town record. Plaintiffs'

Exhibit 60 shows Bradley Road west of Port Washington Road to be three rods in width. Mr. Stern testified further (R. 915) that the latest record would be a three rod road and that County records disclose no condemnation suits, deeds or other method of conveying any greater amount of land for road purposes by any adjoining property owners for a greater width than the three rod road which he testified to. (R. 916).

Since a rod is defined as 16½ feet, three rods would total 49.5 feet. The Nolte description runs to 33 feet south of the center of the road and then east along the South line of the Road. Since the south line of the road would be one-half of 49.5 feet or 24.75 feet, the description must fail because 8.25 feet are not disposed of and would be in "no man's land".

The faulty description above referred to is certainly just cause for striking the Nolte petition.

The Donohue Petition Is Valid Even If His Petition Was Circulated December 16, 1954.

Section 62.07(1)(a) in referring to the circulation, states "provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality in which the adjacent territory is located * * * ".

Appellants respectfully submit that the legislature was not attempting to control the physical manner of attaching the signs of posting nor proclaiming the hours or days necessary for the posting. Appellants submit that if the posted notices were physically present through the ten to twenty days prior to the circulation, the statute was complied with.

There can be no question but that eight notices were up by November 22, 1954. There is no claim in the record by defendants that they were not still up twenty days prior to December 16, 1954, the date the trial court found the circulation of the petitions to have been commenced. Appellants submit that the legislature was not objecting to notices being posted more than twenty days prior to the circulation if the postings remained visible. The obvious intent of the statute is to have the postings visible to the electors at least 10 but *not more* than 20 days before the circulation began. If the postings remain up within the ten to twenty day period prior to circulation, the petition should be considered valid. The statute clearly requires only that the notice be posted between the 10 to 20 day period before circulation. Obviously to post the notice and then take it down more than 20 days before circulation would be contrary to statute because the public might ignore the issues, but the statute calls for the giving of the notice, and if the notice was present within the time specified, the statute was complied with.

Appellants submit, the trial court misconstrued the statute by placing the emphasis on the posting process rather than the presence of the notice.

The Nolte Petition Was Brought in Bad Faith and Sought to Combine Two Separate Adjacent Territories.

Section 62.07 of the Wisconsin Statutes provides:

"Section 62.07. Annexation and detachment of territory. (1) *Annexation procedure.* Territory adjacent to any city may be annexed to such city in the manner following:

(a) A petition therefor shall be presented to the council 1. signed by a majority of the electors in such

adjacent territory and by the owners of one-half of the real estate within the limits of the territory proposed to be annexed, or 2. if no electors reside in the said adjacent territory signed by the owners of one-half of taxable property therein according to the last tax roll, or 3. by a majority of the electors and the owners of one-half of the real estate in assessed value; provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality in which the adjacent territory is located, and a copy of such notice published in a newspaper of general circulation within the county in which said adjacent territory is located, at least 10 days prior to the time when such petition is caused to be circulated, such notice to set forth that an annexation petition is to be circulated, and including an accurate description of the territory involved."

Each reference in the statute refers to "such adjacent territory". It is clear that in our case, there are two adjacent territories which cover each other at the Bradley Road with only a 26.88 feet overlapping. The south territory had village characteristics but the northern sector had rural characteristics with only a handful of residents. The only purpose of including the northern territory to the petition was to "control Donohue". The northern territory set off for the most part from the rest of Fox Point by a creek, involves acreage and unimproved land owned primarily by Appellant Donohue.

Wilmer J. Blong, Village Engineer of Fox Point, testified that the annexation of Town of Milwaukee area to the City of Glendale in Ordinance 88 of the City of Glendale did not amount to a closure (R. 835-836). He said it was impossible to go west to point A to G (R. 837). It would thus appear, there is still a Town of

Milwaukee and our annexation case does not dispose of the Town of Milwaukee.

It is clear from an examination of the testimony that the Nolte petition was designed primarily to end the Town of Milwaukee rather than to bring Donohue into Fox Point.

Counsel for Defendant, on page 414 of Record, stated on the record that plaintiffs could have judgment on their complaint if the petition for annexation to River Hills were presented and accepted.

Appellant submits that the Fox Point annexation was designed to prevent him from proceeding on his other Quo Warranto proceeding pending in the Circuit Court of Milwaukee, so that the Town of Milwaukee records could be audited.

Significant also is the bill for debating Donohue and the development of a campaign to refute his arguments against annexation to Fox Point together with allied matters referred to in Exhibit 45 (R. 778 and 779) for which the sum of $1,250 was paid by the Village of Fox Point. Further charges of bad faith were made by plaintiff Donohue (R. 415 and 416) and then stricken by the trial judge, although he had himself asked the question.

In the *Ocean Beach Heights Inc, et al, vs. Brown-Crummer Investment Co., et al,* the United States Supreme Court in the case reported at 302 U.S. 614, held that where a Florida Statute granted no authority to include non-contiguous areas, electors residing on the west side of a Bay who incorporated a town with boundaries described as embracing also land on the east side of the Bay, acquired no jurisdiction either de jure or de facto over the east side lands. This case embraces

the doctrine enunciated in 1892 in *Town of Enterprise vs. State* reported at 29 Fla. 128, 10 So. 740, 744, in which the State Supreme Court of Florida held that their Statute did not permit incorporation of disconnected tracts of land and stated: "An attempt to incorporate two distinct detached tracts of land as corporate territory, under their government, is unauthorized and void." In the *Ocean Beach* case, during the year 1926, electors residing in Dade County, Florida on the west side of Biscayne Bay, incorporated a town, Miami Shores, now called North Miami. The boundaries specified by the incorporation included approximately 16 square miles, 14 of which were on the west side of the Bay and had a population of 2500. Two (2) square miles were on the east side and had but 12 inhabitants. Though nearly vacant, these lands were much more valuable than all the property on the west side. The water separating the two areas was about one-half mile wide. At the time of incorporation, construction of a causeway had been commenced but not completed. The Supreme Court held that the west side electors were without authority to incorporate the east side tract with that in which they resided and said: "The consent of owners of land located beyond permissible limits of the municipality cannot be made to serve as would a statutory grant of power."

THIS ISSUE IS OF PUBLIC IMPORTANCE

"Gerrymandering" is defined in 18 American Jurisprudence, at page 194 as a term employed to describe an apportionment of representative districts contrived so as to give an unfair advantage to the party in power. The power to "Gerrymander", through the technique of

establishing artificial corridors and unnatural boundary lines completely unrealistic with respect to either population or area is the power to deprive Americans of their civil rights and privileges.

Annexations must be carefully observed and analyzed to prevent local treasuries and records from disappearing, local assets purchased and maintained with tax money from electors in the community from being dissipated or converted illegally. Petitioner should have every right to continue to live in the Town of Milwaukee and receive the benefits of these assets which he helped accumulate and which he claims have been dissipated.

Petitioner contends that the Wisconsin Statute granted no authority to include non-contiguous areas in an annexation such as we have here. The annexation of said tracts by Respondent Village without a majority vote of the electors of one of said tracts should be held unauthorized and void, a denial of due process and the equal protection of the law.

The civil rights of James J. Donohue were shabbily disregarded by the Village of Fox Point and he became an abject minority as a result of unrealistic sophistry which overlooked the fact that a petition for annexation was signed by residents in a subdivision one and one-eighth mile from the smaller locality in which he resides, and there were no residents in either of the two corridors extending for one and one-eighth mile, the halves of such corridors themselves only barely touching. It is the same as saying that two areas on opposite sides of the District of Columbia could be annexed on the petition of only one area by virtue of a twenty-six foot corridor on the bank of the Potomac River which appears at low tide.

The annexation involved in this case should be held null and void in the public interest and for the preservation of civil rights generally.

The case of *Sherill vs. O'Brien*, 188 N.Y. 185, 81 N.E. 124, 117 Am. St. Rep. 841, holds that the constitutional requirement of compactness seems to have been disregarded by the creation of a senate district with boundaries of many sides and angles, where reference to the boundaries of the senate district in the county, as made by the constitutional convention, shows that the county can be divided into districts which are reasonably compact, each having comparatively few sides and angles.

The case of *State ex rel Lamb vs. Cunningham*, 83 Wis. 90, 53 N.W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27, holds that the constitutional provision of compactness is violated by the creation of a district entirely surrounded by another, where the laying out of districts in such form is not shown to have been made necessary by any other provisions of the Constitution.

Wherefore, your Petitioners respectfully pray that a Writ of Certiorari be issued out and under the seal of this Court directed to the Supreme Court of the State of Wisconsin, sitting at the City of Madison, State of Wisconsin, commanding that Court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and proceedings had in this case numbered and entitled on its docket as Case number 138, August Term, 1956, to the end that this case may be reviewed and determined by this Court; that said judgment of the Supreme Court of the State of Wisconsin may be reversed by this Court; and that

your petitioners may have such other and further relief in the premises as may be just and proper.

Dated at Milwaukee, Wisconsin, this 20th day of August, 1957.

Respectfully submitted,

SYDNEY M. EISENBERG,
1131 West State Street,
Milwaukee 3, Wisconsin,
Attorney for Petitioners.

EXHIBIT NO. 1

Supreme Court of Wisconsin
AUGUST TERM, 1956.

Donohue v. Fox Point, 275 Wis. 182.

BROADFOOT, J. Upon this appeal three issues are presented. The first matter to be determined is whether or not the Donohue proceedings were valid. From the finding of the trial court and from the record it appears that Donohue posted eight notices of intention to circulate annexation petitions on November 19, 1954. It was discovered that one of said notices was posted in the village of Fox Point rather than in the town of Milwaukee. Thereafter, and on November 22, 1954, plaintiff Freyer posted two additional notices thereof in the town of Milwaukee.

Both proceedings contemplated annexation to a village. Sec. 61.185, Stats., provides that sec. 62.07, covering annexation procedure to cities shall govern in the case of villages. By sec. 62.07 the first statutory requirement is that a notice of intention to circulate an annexation petition be posted in at least eight public places in the town in which the area proposed to be annexed is located. Thereafter the petition for annexation is to be circulated. Such petition shall not be valid unless at least ten days and not more than twenty days before the same is caused to be circulated the notices are so posted. A further requirement is that the notice be published in a newspaper of general circulation within the county at least ten days prior to the time such petition is caused to be circulated.

The Donohue notice was published on December 2, 1954. The first signature upon the Donohue petition was

that of Donohue himself and it bears December 16, 1954, as the date of signing. The trial court found that the Donohue petition for annexation to the village of River Hills was first circulated December 16, 1954. If correct, that finding determines the first issue. Whether the time within which the annexation petition had to be circulated was calculated from November 19th or November 22d is immaterial. If the Donohue petition was first caused to be circulated on December 16, 1954, then in either event it was more than twenty days after the posting of such notices. The plaintiffs challenge said finding upon this appeal.

The plaintiff Donohue was not consistent in his statements upon this point. At an adverse examination held on May 24, 1955, Donohue testified that he obtained the first signature on the petition for annexation to River Hills on November 20th. At a continuation of said adverse examination, in answer to a question as to when he circulated the petition, he said the document speaks for itself, and that the first signature thereon was his own under date of December 16th. Each side moved for summary judgment in July, 1955. In an affidavit in support of plaintiffs' motion for summary judgment, Donohue stated that he first circulated the petition "on or about December 12, 1954." Upon the trial Donohue testified that circulation of his petition commenced December 12th and that one Tyczinski had the petition first. Again he testified that Tyczinski got it after he, Donohue, had signed it. It appears from the petition itself that the second signature upon the petition is that of Tyczinski, which was dated January 6, 1955. The trial court, in its memorandum decision, reviewed this conflicting testimony and then held that the Donohue petition was first circulated on December 16, 1954. Tyczinski was not call-

ed as a witness upon the trial. Because of the conflict in the testimony we cannot say that the finding of the trial court is against the great weight and clear preponderance of the evidence. On the other hand, it appears that said finding is fully supported by the record. There was no compliance with the statute, therefore, because of the late date on which the Donohue petition was caused to be first circulated.

The plaintiffs next attack the Nolte proceedings on the ground that the territory annexed to the village of Fox Point was not contiguous. Prior to these proceedings the territory comprising the town of Milwaukee had largely been absorbed by incorporation and annexation proceedings, until in November, 1954, all that remained of the town of Milwaukee was an area of approximately 90 acres. This territory consisted of something in excess of 40 acres to the north and a tract of approximately the same size to the south which were connected by a narrow corridor. Donohue lived in the northern section. The village of Fox Point bordered upon this entire area on the east. On the west the remainder of the town of Milwaukee was bordered by the village of River Hills and the city of Glendale. The plaintiffs argue about the shape of the remaining area of the town of Milwaukee and contend that because the two larger portions are connected by a narrow corridor the entire area is not contiguous. Sec. 62.07, Stats., provides only that territory "adjacent" to any city may be annexed to such city. From the exhibits in the record it is apparent that the boundaries of the village of Fox Point are adjacent to the entire tract that it annexed. The peculiar shape of the land remaining in the town of Milwaukee was due to other proceedings by way of incorporation and annexation. We can find no merit in the second question raised by the plaintiffs.

The third issue raised is one advanced by the defendant, which claims that the Donohue proceedings were not started in good faith or conducted and completed within a reasonable time. The petition had not been filed with the village of River Hills at the time of the trial. The trial court found it unnecessary to determine this issue, and we so find.

So far as the record shows, the Nolte proceedings were valid and the area in question has been properly annexed to the village of Fox Point. The Donohue proceedings were invalid because of the finding that the petition was first caused to be circulated on December 16, 1954.

By the Court.—Judgment affirmed.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 23 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number 413

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MAXWELL H. HERRIOTT,
Counsel for Respondent,
411 E. Mason St.,
Milwaukee 2, Wis.

FRALEY N. WEIDNER,
Of Counsel,
324 E. Wisconsin Ave.,
Milwaukee 2, Wis.

INDEX

Page

A. All issues raised are of state law 2

Most of petitioner's argument is that the annexation proceedings involved did not comply with Wisconsin statutes. This does not present a Federal question and does not give this Court jurisdiction.

B. The alleged Federal Constitutional question was not properly raised 2

Petitioner sets forth several instances where during the course of trial he referred to his Constitutional rights without indicating what Constitution, State or Federal or what Constitutional rights were involved. This is too general and vague to present an issue as to denial of any Federal Constitutional right and does not give this Court jurisdiction.

C. Petitioner has not followed the rules of Court 4

The prompt notice required by rule 34-4 was not given and the notice required by rule 12-2 has not been given as of the time this material was taken to the printer.

Conclusion 5

INDEX TO AUTHORITIES

Cases

Miller v. Cornwall, 168 U.S. 131, 18 S. Ct. 34, 42 L. Ed. 409 3

Neblett v. Carpenter, 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182 2

Page

Porter v. Foley, 65 U.S. (24 Howard) 415, 16 L. Ed. 740 4

Thomas v. Iowa, 209 U.S. 258, 28 S. Ct. 487, 52 L. Ed. 782 3

Walker v. Newbold, 59 U.S. (18 Howard) 511, 15 L. Ed. 506 3

Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398 4

Wisconsin Statutes

Section 62.07 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number 413

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The decision of the Wisconsin Supreme Court is reported in 275 Wis. 182, 81 N.W. (2d) 521.

NO FEDERAL QUESTION IS PRESENTED BY THIS CASE. PETITIONER MERELY CONTENDS THAT THE WISCONSIN SUPREME COURT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT THE ANNEXATION OF CERTAIN TERRITORY TO THE VILLAGE OF FOX POINT COMPLIED WITH THE STATE STATUTE.

A. All Issues Raised Are of State Law.

On page 4 under "Questions to be Presented" 1 (a), petitioner states that the lands sought to be annexed are not contiguous, and then later in his petition argues this issue (petition, page 6), and also argues that the Nolte petition for annexation is defective (petition, page 10), that the Donohue petition for annexation to River Hills was valid (petition, page 11), that the Nolte petition was brought in bad faith (petition, page 12), and that the issue is of public importance (petition, page 15).

All of these issues are simply the contention of the petitioner that the annexation proceeding did not comply with the provisions of the Wisconsin Statutes, Section 62.07, set forth in petitioner's petition, pages 12-13.

This does not present a federal question and does not give this Court jurisdiction.

Neblett v. Carpenter, 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

B. The Alleged Federal Constitutional Question Was Not Properly Raised.

At page 4 of petitioner's petition under "Questions to be Presented," petitioner sets forth as a second question under 1(b) whether or not the removal of petitioner from one political division to another by annexation without his consent and that of other inhabitants is a denial of equal protection of law under Article XIV of Amendments, Section 1, and Article V of the United States Constitution, Amendments.

Nowhere does petitioner specifically set forth the express provisions of these amendments which he claims were violated.

Petitioner, at pages 4 and 5 of his brief, does set forth, out of context, certain quotations from the record wherein the witness Donohue referred to his constitutional rights, and one instance where his attorney referred to constitutional rights.

Nothing could be more vague or indefinite than these references. What Constitution was referred to, state or federal, and what Constitutional rights were involved are not specified and cannot be determined from reading the record. It is evident that no question involving the Constitution of the United States was presented to the Wisconsin courts for decision and, therefore, this Court has no jurisdiction.

To give this Court jurisdiction it must appear from the face of the record that the constitutional question was raised, not merely that it might have been raised, and the mere allegation that a charge of the court was against and in conflict with the Constitution and laws of the United States is too general and indefinite.

Walker v. Newbold, 59 U.S. (18 Howard) 511, 15 L. Ed. 506.

Miller v. Cornwall, 168 U.S. 131, 18 S. Ct. 34, 42 L. Ed. 409.

Something more than a vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state court to give this Court jurisdiction. *Thomas v. Iowa*, 209 U.S. 258, 28 S. Ct. 487, 52 L. Ed. 782.

Where it was objected in the state courts that an act of the state was "unconstitutional and void," the objection was properly construed in those courts as raising the

question whether the state legislature had the power under the state Constitution to pass the act, and not as having any reference to any repugnance to the Constitution of the United States. *Porter v. Foley,* 65 U.S. (24 Howard) 415, 16 L. Ed. 740.

It does not appear from the record that any federal question was presented to the highest court of the state having jurisdiction or that the decision of a federal question was necessary to its determination of the cause. Hence, this Court has no jurisdiction. *Williams vs. Kaiser,* 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398.

C. Petitioner Has Not Followed the Rules of Court.

While we believe the above clearly shows that the petition for certiorari should be denied upon its merits, we call the Court's attention to the fact that petitioner has not followed the rules of court.

The time for a petitioner to file a petition for certiorari was extended by an order entered August 5, 1957. Notice of this was given to Respondent by a letter dated August 16th, postmarked August 19th, and received August 20th. This is not the prompt notice called for by Rule 34-4.

As of the date of taking this material to the printer (September 10, 1957), Respondent has not been notified of the date of filing the petition and the document number, nor the contents of the record, as required by Rule 21.

CONCLUSION

The petition for writ of certiorari should be denied because the issues determined by the Wisconsin Supreme Court were questions of state law and no federal question was presented to or arises from the decision of the Wisconsin Court.

Respectfully submitted,

MAXWELL H. HERRIOTT,
Counsel for Respondent.

FRALEY N. WEIDNER,
Of Counsel.

LIBRARY
SUPREME COURT U.S.

FILED
DEC 7 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number 413

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

PETITION FOR REHEARING

SYDNEY M. EISENBERG,
1131 West State Street,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

SUBJECT INDEX

	Page
Petition for Rehearing	1
Basic Facts	2
Argument	2-4
Conclusion	5

Cases Cited

Davidson vs. New Orleans, 96 U. S. 97	3
Houck vs. Little River Drainage District, 239 Wis. 254	3
Myles Salt Company, Limited vs. Board of Commissioners of the Iberia and St. Mary Drainage District, 239 U. S. 478	2, 4

Statute Cited

Wisconsin Statutes, 1955, Sec. 62.07(1)(a)	2, 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number 413

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

PETITION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray for a rehearing of the order of this Honorable Court dated Nov. 12, 1957, denying their petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BASIC FACTS

This was a proceeding brought by James J. Donohue in the Circuit Court for Milwaukee County, State of Wisconsin, against the respondent Village of Fox Point to declare null and void the proceedings of the respondent to annex certain lands in the Town of Milwaukee to respondent village and to have petitioners' proceedings to annex a portion of said land to the Village of River Hills adjudicated as prior and valid. Judgment dismissing petitioners' complaint was entered in the trial court, which judgment was affirmed by the Supreme Court of the State of Wisconsin.

ARGUMENT

We are aware of the mathematical percentages against petitioners on a rehearing petition, but in the original petition we were not aware of the *Myles Salt* case, 239 U.S. 478, and failed to raise the constitutional question of the validity of Sec. 62.07(1)(a) of the Wis. Statutes upon which the annexation is hinged.

We respectfully submit that under the ruling in *Myles Salt Company, Limited vs. Board of Commissioners of the Iberia and St. Mary Drainage District*, 239 U. S. 478, holding that although a Statute of the State may be valid, a petitioner may attack said statute as administered as depriving him of his property without due process of law.

The Louisiana Supreme Court in the *Myles Salt* case determined that the creation and determination of drainage districts being a legislative and lawful exercise of discretionary powers, the courts are without power to impugn or inquire into their motives. This Honorable Court reversed this holding that the legislature of the

state may constitute drainage districts and define their boundaries or may delegate such authority to local administrative bodies of the State and held that their action cannot be assailed under the Fourteenth Amendment *unless it is palpably arbitrary and a plain abuse.*

We respectfully submit that municipal corporations as well as Drainage Districts are subordinate creatures of the State and as such are subject to the restrictions imposed by the Fourteenth Amendment.

Houck vs. Little River Drainage District, 239 Wis. 254, 262.

The legislative act of the state or a subordinate body thereof may come in conflict with the due process clause of the Fourteenth Amendment when found to be arbitrary, unreasonable, confiscatory and flagrant abuse of power. See *Davidson vs. New Orleans*, 96 U. S. 97.

It is respectfully submitted that there must be a reasonable relationship between the territory sought to be annexed and the annexing municipality before such property can lawfully be annexed. Whethe or not this relationship actually exists is not finally for decision by the annexing municipality but must be subject to review by the courts when attacked on constitutional grounds.

The lands sought to be annexed in the *Donohue* case do not bear a reasonable relationship to the annexing municipality. The corridor allegedly connecting the forty-five acres southern tract is from 26.88 feet to 100 feet wide and more than one mile long, thus resulting in the annexation of land which has no reasonable connection with the annexing municipality.

Counsel respectfully submits that the annexing of such territory is palpably and plain abuse of the State of Wis-

consin statute relative to annexation set forth in our original Petition as Section 62.07 of the Wisconsin Statutes, on page 12 thereof, and we ask that the *Myles Salt* case be applied to the question of jurisdiction.

It is respectfully submitted that the Wisconsin Statute governing Annexations of Territory namely, Section 62.07(1)(a) is confusing, vague, and indefinite in that it requires a posting of notices at least 10 days and not more than 20 days before any petition for annexation is caused to be circulated.

62.07 of the Wisconsin Statutes, 1955 reads:

"ANNEXATION AND DETACHMENT OF TERRITORY

(1) Annexation Procedure.

Territory adjacent to any city may be annexed to such city in the manner following:

(a) A petition therefor shall be presented to the council 1. signed by a majority of the electors in such adjacent territory and by the owners of one-half of the real estate within the limits of the territory proposed to be annexed, or 2. if no electors reside in the said adjacent territory signed by the owners of one-half of taxable property therein according to the last tax roll, or 3. by a majority of the electors and the owners of one-half of the real estate in assessed value; provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality in which the adjacent territory is located, and a copy of such notice published in a newspaper of general circulation within the county in which said adjacent territory is located, at least 10 days prior to the time when such petition is caused to be circulated, such notice to set forth that an annexation petition is to be circulated, and including an accurate description of the territory involved."

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Supreme Court of the State of Wisconsin be reheard and vacated and that said petition for certiorari be granted.

Respectfully submitted,

SYDNEY M. EISENBERG,
1131 West State Street,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

The undersigned, Sydney M. Eisenberg, attorney for petitioners hereby certify that the petition for rehearing filed in this cause is presented in good faith, and that in his judgment said petition is restricted to the grounds specified in paragraph two of Rule 58 of the Supreme Court Rules, and that the foregoing petition for rehearing is not presented for delay.

Sydney M. Eisenberg

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that a copy of the foregoing petition for rehearing has been served upon .....

..... counsel of record for respondent, by delivering to and leaving with said respondent counsel a true copy thereof.

_____